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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

MARIE CHELLINO)	NO. C07-3019 CRB
)	
Plaintiff,)	PLAINTIFF'S REPLY BRIEF
)	IN SUPPORT OF HER MOTION
vs.)	FOR SUMMARY JUDGMENT
)	Date: March 28, 2008
KAISER FOUNDATION HEALTH PLAN, Inc)	Time: 10:00 a.m.
a corporation; DOES 1)	Courtroom 8
through 10, inclusive,)	Judge Charles R. Breyer
)	
Defendants.)	

"Disability claimants should not be penalized for attempting to lead normal lives. . . . 'Many home activities are not easily transferable to . . . the more grueling environment of the workplace, where it might be impossible to periodically rest or take medication.' . . . Only if the level of activity were inconsistent with the Claimant's stated limitations would these activities have any bearing on Claimant's credibility." Reddick v. Chater 157 F.3d 715, 722 (9th Cir. 1998). In Vertigan v. Halter 260 F.3d 1044, 1050 (9th Cir. 2001) the court wrote, "One does not need to be 'utterly incapacitated' in order to be disabled. In addition, activities such as walking in the mall and swimming are not necessarily transferable to the work setting with regard to the impact of pain. A patient may do these activities despite pain for therapeutic reasons, but that does not mean she

1 could concentrate on work despite the pain or could engage in similar activity for
2 a longer period given the pain involved."

3 Until Dr. Krames viewed the surveillance videos, he agreed that Ms.
4 Chellino was totally disabled and that the cause of her total disability was
5 fibromyalgia. The only thing that changed Dr. Krames' mind was the later
6 viewing of the surveillance videos. He never read the surveillance reports nor did
7 he reexamine Ms. Chellino. Contrary to defendant's arguments that Ms. Chellino
8 claimed that she could not function in the world and she obviously can as shown
9 by the videos, Ms. Chellino told Dr. Krames and he knew from the records that
10 she shopped, walked for 30 minutes at a time sometimes twice a day, talked, and
11 walked and rode horses. Do the videos show activity by Ms. Chellino that
12 contradicts what Dr. Krames believed about her when he wrote that she was totally
13 disabled? Absolutely not.

14 Dr. Krames also knew, before he viewed the videos, that Ms. Chellino
15 walked with her hands in her pockets to support her hands and arms, drove with
16 pillows supporting her, and wore wrist braces and a neck brace at times. He knew
17 that she was taking narcotic analgesics for pain and that she had cognitive
18 problems. He was told that she could not sit long enough to perform productive
19 work and that she carried only light objects and she carried them against her body
20 rather than in her hands alone.

21 The only thing that could have changed Dr. Krames' mind about Ms.
22 Chellino's state of disability was the videos. It is important that they be viewed.
23 The surveillance reports were not read by Dr. Krames. He only viewed the videos
24 and he attributes his change of opinion to the videos only. 439-440.¹ No matter
25

26 ¹ Defense counsel has accused this writer of falsely describing to the
27 court the content of the surveillance videos. Def's Brief footnote 2. I have
28 written that the videos show Ms. Chellino carrying an empty plastic bucket
against her chest. Defense counsel points out that it was not one bucket

1 what defense counsel saw in the videos that she reviewed, the videos given to the
2 plaintiff show Ms. Chellino carrying only the lightest of objects², most of the time
3 against her body; resting in her car; walking with her hands in her pockets;
4 shopping with the help of a box boy; and riding the slowest horse imaginable.³
5 Dr. Krames knew that she did all of these things when he found her totally
6 disabled. 330.

7
8 but two; they were not empty and they were carried "in one or the other
9 of her hands, or under one or the other of her arms, or with both hands, or
10 on her hip." I never saw Ms. Chellino carrying more than one bucket at
11 a time. Defense counsel seems to be relying not on the videos but on the
12 surveillance report however she does not cite to the page of the report that
13 says Ms. Chellino was carrying more than one bucket and, in any case, Dr.
14 Krames relies solely on the videos. From a view of the videos, it looks
like Ms. Chellino was carrying one bucket at a time and that it was empty
and being carried, most of the time, against her some part of her body, hip
chest or stomach, for support.

15 ² Please note that Dr. Krames, after viewing the videos, limited Ms.
16 Chellino to holding "objects up to 5 pounds." 440.

17 ³ Defense counsel finds it "difficult to credit" my allegation that
18 Aetna did not send me during the administrative review the same
19 surveillance videos that were sent to me after litigation began. Def's Opp.
20 Brief 4/16. The plaintiff has submitted to the court, and sent a copy to the
21 defendant, of the video given to me by Aetna during the administrative
22 review, Exhibit 1585. Not only is there no horse back riding in the video,
23 Exhibit 1585 contains scenes not to be found on the videos sent to me after
24 litigation began. Exhibit 1585 contains scenes from April 17, 2005 at 6:11,
7:03, 8:00, 8:59 a.m. and April 18, 2005 at 1 p.m. that cannot be found on
the videos sent to me after litigation began. How could I have possibly
made a video that contains scenes that are not in the videos sent to me post
litigation? Where would I have gotten them?

25 More importantly, if Aetna sent me something less than all of the
26 surveillance, how do we know that it has given the court videos with all
27 of the surveillance? I am assuming, but do not know and am now unsure,
28 that the videos that I received post litigation are the same as were filed by
the defendant with the court and the same that were showed to Dr. Krames.

1 In his second report, after viewing the videos, Dr. Krames wrote that Ms.
 2 Chellino "walked without antalgic gait." 439. This fact is a claimed basis for his
 3 changing his opinion from disability to no disability. An antalgic gait is a limp
 4 caused by painful pressure put on a leg when walking.⁴ In fact, however, Dr.
 5 Krames knew that Ms. Chellino did not walk with an antalgic gait when he first
 6 examined her and found her to be totally disabled. Antalgic gait or not made no
 7 difference to him. No rational person can believe that someone with enough pain
 8 to cause an antalgic gait would voluntarily walk twenty minutes a day, sometimes
 9 twice a day, and sometimes up to an hour, as she told Dr. Krames she did. 330.
 10 Yet Dr. Krames, knowing that Ms. Chellino was a walker, still found her to be
 11 totally disabled. Further, his first report does not mention that she walked with a
 12 limp when he examined her, something an IME hired to evaluate disability would
 13 have been on the lookout for. The fact is that Dr. Krames knew that Ms. Chellino
 14 was not even complaining of leg pains. "Marie Chellino complains of pain all
 15 over her body including, but not limited to, pain in her throat, neck, shoulder,
 16 arms, wrists, hands, lower back, spine, head, chest, and mid back." 326. There
 17 was no reason for him to consider an antalgic gait until Aetna's desire to terminate
 18 her benefits became known to him.

19 The videos show Ms. Chellino wearing wrist braces bilaterally. The videos
 20 show her wearing a neck brace. The videos show her walking with her hands in
 21 her pockets. The FCE notes that she walks with her hands in her pockets. 854.
 22

23 ⁴ "Antalgic gait refers to a posture or gait assumed in order to avoid
 24 or lessen pain. . . . The key concept to keep in mind when dealing with
 25 antalgic gait is that the patient will try to minimize the amount of weight
 26 applied to the painful limb or joint and the amount of time that weight is
 27 applied. The result is a limp, a decreased single support time for the
 28 affected limb, a shortened stride length for the contralateral limb, and an
 increased double support time.
<http://sprojects.mmi.mcgill.ca/gait/antalgic/intro.asp>

1 On July 21, 2003, the plaintiff filled out an Aetna claim form in which she wrote,
2 "I keep my hands/arms supported in my pockets." 36. Dr. Krames wrote, after
3 viewing the videos, that Ms. Chellino "in **almost** every single tape, walked without
4 antalgic gait and without any degree of pain behavior seen." (emphasis added)
5 439. He knew she was wearing the wrist and neck braces to lessen pain. 327.
6 He knew why she walked with her hands in her pocket. Surely he must have seen
7 that when she entered her vehicle, she arranged pillows to make her driving more
8 comfortable. 1582 @ 1:17 p.m. Surely he noticed that she took two rest breaks
9 in her vehicle on April 19, 2005; the first one was for 7 minutes beginning at 4:17
10 p.m. and the second was for 22 minutes beginning at 4:34. When she left her car
11 the second time, she was wearing a neck brace. 1579. Resting for 29 minutes in
12 her car in the middle of the afternoon, wearing a neck brace, wearing wrist braces,
13 walking with her hands in her pockets, and driving a car with pillows supporting
14 her back is pain behavior.

15 Defendant claims that the videos show plaintiff doing things "contrary to
16 what she had told him [Krames] she was capable of doing." Def's Opp Brief
17 3/28-4/1. What things? Defendant claims that Ms. Chellino was only wearing
18 braces in the 2005 surveillance videos because "she undoubtedly was warned by
19 Dr. Padgett that she might be under observation." Def's Opp Brief 3/5-6. How
20 does defendant explain Ms. Chellino being filmed with wrist braces on May 11,
21 2004, prior to Dr. Padgett being shown the videos? 1583 @ 5:25 p.m.

22 The defendant writes, in support of the merits of its position, that Dr.
23 Padgett, the plaintiff's treating doctor, "repeatedly reported to Aetna that she
24 continued to improve 'tremendously.'" In support of this allegation the defendant
25 points to documents 295 and 311. Def's Opp Brief 2/7-10. Document 311 is
26 unintelligible. Defendant takes the word, "tremendously," out of context in
27 document 295. What Dr. Padgett wrote was, "I have been Marie Chellino's
28 primary treating physician for her pain condition for some time now, approaching

1 5 years. Although she has tremendously improved from where she was when I
2 first started treating her, at this time I don't believe that Marie is at a point where
3 she would [be] able to work in any occupation." 295. Misinterpreting a treating
4 doctor's statements out of context was discussed in Saffon v. Wells, Fargo 511
5 F.3d 1206 fn 4 (9th Cir. 2008). The court held that it "could be a sign of either
6 inattention to important details or bad faith. In either event, it suggests less
7 deference should be given to the decision of the claims administrator."

8 Defendant writes, "Plaintiff's statement that Dr. Marks and Dr. Krames were
9 in disagreement is inexplicable." Let me explain. Dr. Krames wrote, "She enjoys
10 horseback riding and at the direction of her physician and physical therapist, she
11 has been instructed to visit her horse barn daily. . . . She rides approximately 15-
12 20 minutes at a time; occasionally, she does this two times a week." 330. At the
13 time he wrote this, he found Ms. Chellino to be totally disabled. 337. Obviously
14 Dr. Krames did not believe that horseback riding necessarily precluded total
15 disability. Dr. Marks, on the other hand, wrote, "Any person that can . . . mount
16 and ride a horse, cannot in any reasonable way be thought of as being disabled
17 from work." 893.

18 Further, defendant wrote in its Motion for Summary Judgment that one of
19 the reasons for the termination of benefits was that Dr. Marks, "an independent,
20 Board-certified rheumatologist opined that . . . her treating physician's statements
21 regarding alleged disability were internally inconsistent." Def's MSJ 2/25-27.
22 Nowhere in his report does Dr. Marks write that Dr. Padgett, or any other doctor
23 that treated the plaintiff, made statements that are internally inconsistent. Dr.
24 Marks does write that the plaintiff's "physiatrist . . . kept noting how much she
25 was improving, although the claimant kept grading her pain exactly the same, 8-
26 9/10." 893. Defense counsel, pushing the envelope a bit, may interpret this
27 statement of Dr. Marks to mean that Dr. Padgett was inconsistent. If so, Dr.
28 Krames never noted in either of his reports any inconsistency in Dr. Padgett's

1 records -- another example of Drs. Marks and Krames disagreeing.

2 Defendant overstates the plaintiff's position in order to knock it down.
3 Aetna writes that Ms. Chellino attempted "to portray her equestrian activities as
4 only infrequent and casual." Def's Opp Brief 2/20. Certainly she did not do that
5 with Dr. Krames. As stated above, Dr. Krames wrote that he was told that the
6 plaintiff goes to the horse barn every day and that she rides the horse 2 to 3 times
7 a week. 336. It would be nice if the defendant would cite to a page in the
8 administrative record to support its factual allegations.

9 Dr. Marks wrote, "A Functional Capacity Evaluation done in April of 2006
10 noted there is significant pain focused behavior, leading to **inconclusive results**."
11 892. The person that administered the FCE wrote, "High pain focus interfered
12 with client's ability to perform to maximum ability. **Unable to accurately assess**
13 **her abilities**." 855. An Aetna internal note describes the FCE in this case as an
14 invalid test. 1388. Aetna wrote to Ms. Chellino, "the results of the testing
15 resulted in the FCE not being valid because it was determined that you were not
16 fully participating." 843. An article about FCE's in the administrative record
17 says, "Reporting a lack of full participation to the employer or insurer may have
18 repercussions for the client. Therefore, a reliable and valid method of determining
19 subject participation is vital, **but none have been supported by current**
20 **research**." 593. In other words, when the subject of a FCE says that pain is
21 preventing him from performing some task, there is no way to know if the
22 person's performance is prevented by pain or not. Dr. Marks assumed that Ms.
23 Chellino was faking and used that assumption as the basis for his opinion that she
24 was not disabled. 893. He never met her and never spoke to her. He based his
25 conclusion on a test that everyone agreed was invalid. That is not just arbitrary
26 and capricious. It is dishonest.

27 Defendant misstates the plaintiff's position regarding the decision in Abatie
28 v. Alta 458 F.3d 955 (9th Cir. 2006). Defendant writes, "plaintiff misstates

1 Abatie, arguing that mere existence of a structural conflict (because Aetna funds
2 and also decides claims) precludes deference." Def's Opp 6/24-26. As seems to
3 be her custom, defense counsel gives no citation to the plaintiff's Motion for this
4 statement. In fact, the plaintiff wrote, quoting from Abatie, 969, "'Plaintiffs will
5 have the benefit of an abuse of discretion review that always considers the inherent
6 conflict when a plan administrator is also a fiduciary, even in the absence of
7 'smoking gun' evidence of conflict.' Thus, even if there were no evidence of
8 Aetna's inherent conflict of interest affecting its decision, the court must apply a
9 modified, less deferential, abuse of discretion review in judging Aetna's decision."
10 Plaintiff's MSJ 13/2-8.

11 Defendant writes that while there may be no way to objectively test for
12 Fibromyalgia, the disabling symptoms of the illness can be objectively tested for.
13 Def's Opp 12/17-20. According to Dr. Krames, Ms. Chellino claimed that she was
14 disabled by pain, discomfiture and fatigue. 329. What are the objective tests for
15 pain, discomfiture and fatigue? Dr. Marks didn't mention any in his report. He
16 mentioned objective tests for "musculoskeletal or neuromuscular abnormalities" but
17 those were not the causes of Ms. Chellino's problems. 893. Dr. Krames did not
18 mention any objective tests that could prove or disprove Ms. Chellino's claim.
19 The first termination letter did not inform Ms. Chellino of specific tests that could
20 prove her pain and fatigue. 841.

21 Sometimes words sound good but have no meaning. Saying that "physical
22 limitations imposed by the symptoms of such illnesses do lend themselves to
23 objective analysis" is easy. The tough part is in identifying the objective tests.
24 Just 2 months ago the Ninth Circuit wrote, "individual reactions to pain are
25 subjective and not easily determined by reference to objective measurements. . .
26 . Pain is a completely subjective phenomenon and cannot be objectively verified
27 or measured. If MetLife is turning down Saffon's application for benefits based
28 on Saffon's failure to produce evidence that simply is not available, that too may

1 bear on the degree of deference the district court shall accord MetLife's decision
2 and on its ultimate determination as to whether Saffon is disabled." Saffon v.
3 Wells Fargo, supra 1216-17. If Aetna terminated Chellino's benefits based on her
4 failure to present objective evidence of pain and fatigue, that should bear on the
5 degree of deference this court should give Aetna's decision.

6 Furthermore, if Aetna was aware of tests that could establish the claim
7 objectively one way or the other, it was obligated to tell the plaintiff about the
8 tests.

9 "If benefits are denied in whole or in part, the reason for the denial must be
10 stated in reasonably clear language, with specific reference to the plan
11 provisions that form the basis for the denial; **if the plan administrators**
12 **believe that more information is needed to make a reasoned decision,**
13 **they must ask for it.** There is nothing extraordinary about this; it's how
14 civilized people communicate with each other regarding important matters."
15 Booton v. Lockheed 110 F.3d 1461, 1463 (9th Cir. 1997).

16 See also Saffon v. Wells Fargo, supra.

17 Finally, plaintiff raised several matters in her Motion for Summary Judgment
18 that the defendant has failed to address. First, there is no evidence in the
19 administrative record that the plaintiff can sit long enough to perform a sedentary
20 job 8 hours a day 5 days a week. Next, the administrative record contains
21 evidence that Ms. Chellino had cognitive problems and that she was using narcotic
22 medicine. 760, 546, 743. All of the Aetna doctors ignored the effects of cognitive
23 problems and the use of narcotics on Ms. Chellino's ability to work. Defendant
24 offers no explanation for this failure.

25 Respectfully submitted,

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27 Charles J. Fleishman
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